

BUD J. CARLSON

IBLA 98-359

Decided July 16, 1999

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying reinstatement of Native allotment application F-032686.

Affirmed.

1. Alaska: Native Allotments

When a Native allotment application has been rejected as a matter of law and the applicant has not appealed that determination, a request for reinstatement of that application is properly rejected based on the doctrine of administrative finality, unless its use would result in manifest injustice or other compelling legal or equitable considerations exist.

APPEARANCES: Harold J. Curran, Esq., Anchorage, Alaska, for Appellant; Carlene Faithful, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Bud J. Carlson (Carlson or Appellant), has appealed from a May 20, 1998, decision by the Alaska State Office, Bureau of Land Management (BLM), denying reinstatement of Native allotment application F-032686 for a 6.5-acre parcel, described as Lot 6, appurtenant to the 118.64-acre allotment already approved for Appellant.

On June 18, 1964, BLM received a Native allotment application pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) listing Bud J. Carlson as the applicant. <sup>1/</sup> Carlson's application was for approximately 117 acres of unsurveyed land located in secs. 33 and 34, T. 17 S., R. 7 W., Seward Meridian, Alaska. The application was unsigned by the applicant and block 8a, asking from what date the land had been occupied by applicant, was blank. On October 13, 1965, BLM rejected Appellant's application as being defective for the foregoing reasons, as

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<sup>1/</sup> The Alaska Native Allotment Act was repealed by the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1617 (1994), with a savings provision for applications pending on Dec. 18, 1971.

well as being in partial conflict with Public Land Order No. (PLO) 1756 of November 17, 1958, 23 Fed. Reg. 9093 (Nov. 22, 1958), which established BLM's administrative site on the land, and in partial conflict with Trade and Manufacturing (T&M) Site application F-030711 filed by Lloyd Davis. BLM advised in the rejection letter that two parcels were open for application within the lands applied for in 1964. Appellant did not timely appeal the rejection.

On November 15, 1965, Appellant filed separate applications for the two parcels (10 acres and 20 acres) that BLM had indicated were open to application within the area sought in his 1964 application. He claimed in these two applications that his use of these lands began in June 1964 and August 1964, respectively. On November 18, 1965, BLM received a letter from Appellant stating that he desired to amend "file Fairbanks 032686" to include all the lands included in his 1964 application, excluding the "lands described in Public Land Order 1756, dated November 17, 1958," a 6.5-acre site claimed by BLM for administrative purposes. On June 28, 1967, the Bureau of Indian Affairs' (BIA's) Realty Officer submitted the affidavits of Carlson and three other individuals to BLM on Appellant's behalf, each claiming that Appellant began using the lands applied for in 1941. These were submitted to rebut a competing claim to a portion of the lands applied for by another claimant, and not in conjunction with submission of Appellant's application forms. In his affidavit, Carlson stated: "I took over the house that was abandon[ed] on the land and start[ed] in 1961."

On March 13, 1968, Appellant filed an amended application describing the lands included in the 1964 application, but specifically excluding the PLO 1756 lands. Therein, he indicated in sections 4 and 8 of the application that he resided on the land beginning on November 1, 1961, and that he used the land continuously from January 1, 1961, through December 31, 1965. He further stated in section 9 that he "used this land all my life for hunting & trapping (sic) and cut wood on it for winter time for heat."

On May 25, 1982, BLM issued a decision entitled "Native Allotment Legislatively Approved as to Parcels A and B, Application Rejected as to Parcel C, Conformance to Survey of Parcel A and B Requested." In its decision, BLM stated that Parcel A had been legislatively approved effective June 1, 1981, pursuant to the Alaska National Interest Lands Conservation Act of December 2, 1980 (ANILCA), 94 Stat. 2371, and that:

Lot 6 of U.S. Survey 5596 was also included in Mr. Carlson's original application. However, this portion of his application was rejected on October 13, 1965, because the lands were withdrawn from all forms of appropriation on November 17, 1958 by Public Land Order 1756 as an administrative site. Since no appeal was filed, Mr. Carlson's application has also been closed as to this portion of his original claim.

Parcel A, BLM stated, consisted of Lots 3, 4, 5, 7, 8, and 9 of U.S. Survey 5596. Lot 6, consisting of 6.5 acres and the subject of this appeal,

was not included in Parcel A, which was transferred to Appellant, because it had been withdrawn by PLO 1756 on November 17, 1958, and Appellant had not reapplied for this parcel in his subsequent application (PLO 1756 was revoked on August 3, 1970. See 35 Fed. Reg. 12657 (August 8, 1970)). Parcel B, Lot 10, consisting of 5 acres, was also conveyed to Appellant and represents that land claimed by Herman Cotter as a T&M site. On December 16, 1988, BLM issued Appellant a certificate of allotment for Parcels A (113.64 acres) and B (5 acres). This did not include the land formerly withdrawn for the administrative site.

On June 25, 1997, Alaska Realty Consortium (ARC), contractor for BIA, filed a request on Appellant's behalf for reinstatement of that portion of Native allotment application F-032686, filed in 1964, which included the 6.5 acres within Lot 6. In her May 20, 1998, decision denying Appellant's request for reinstatement, the Land Law Examiner stated, in pertinent part:

In 1982, when BLM issued its decision regarding Parcel A, it did so on the assumption that each and every statement on Mr. Carlson's Native Allotment application, as amended, and his Alaska Native Allotment Evidence of Occupancy form were correct. Mr. Carlson and ARC are now attempting to create a disputed factual issue by claiming the statements are untrue.

The doctrine of administrative finality holds that an applicant's failure to appeal a decision rejecting his application, even if the decision is erroneous, bars him from questioning the correctness of the decision after the right to appeal has expired. Where there is no showing that the decision rejecting the application was unauthorized, where other interests have intervened, and where there are no equitable considerations justifying reconsideration of the question, a decision which has remained unchallenged by the applicant will not be reopened. Gabbs Exploration Co., 67 I.D. 160 (1960).

To be entitled to reinstatement, the party seeking reinstatement must offer evidence that clearly demonstrates that the original application contained a significant error. The Secretary or those exercising his delegated authority may review a matter previously decided and correct or reverse an erroneous decision. Reexamination of a decision which has become final is available only upon a showing of compelling legal or equitable reasons. See Turner Brothers v. OSM [RE], 102 IBLA 111, 121 (1988) and Lloyd D. Hayes, 108 IBLA 189, 192 (1989).

Mr. Carlson's application was rejected as a matter of law and when he refiled his application, as amended, he specifically excluded the lands within PLO 1756. Neither ARC [n]or the applicant has provided BLM with any compelling legal or equitable reasons to reinstate the application. Since there were numerous

opportunities to correct the use and occupancy date, and especially since Mr. Carlson has waited 33 years after he was first notified that the application did not predate PLO 1756, the reinstatement request for Lot 6, U.S. Survey No. 5596, excluding the George Parks Highway, is hereby denied. See Franklin Silas, 117 IBLA 358 (1991), and Franklin Silas (On Judicial Remand), 129 IBLA 15 (1994).

(Decision at 3-4.)

In his Statement of Reasons (SOR) for appeal, Appellant claims he made an unknowing waiver of his due process right to demonstrate his qualifying use and occupancy of Lot 6 before its November 11, 1958, withdrawal. (SOR at 7.) This occurred, Appellant alleges, because "he was never correctly advised in BLM's 1965 and 1982 decisions or at any other time that he had the right to perfect his preference for lot 6 by demonstrating qualifying use and occupancy prior to 11/17/58." Id. Appellant claims a question of fact does exist concerning when he began his use and occupancy of the subject land, and he is entitled to have his application for Lot 6 reinstated and adjudicated to determine if his use and occupancy began prior to its withdrawal. Id.

In its Answer, BLM asserts that Carlson's original application was properly rejected as a matter of law because it was unsigned and incomplete, therefore, failing on its face to meet the regulatory requirements for a valid application. (Answer at 12.) Despite being advised of his right to appeal the 1965 BLM decision rejecting his application, and despite the revocation of the withdrawal of land represented in PLO 1756 in August 1970, he never reasserted his application for Lot 6 until 1997. BLM states that while Appellant now states he began using the land in 1941, when he was 8 years old, "in all his applications for Parcel A, he claimed actual use and occupancy commencing in the 1960s." (Answer at 13.) Finally, BLM claims, Carlson's claim that he is entitled to a hearing on the issue of whether he commenced use and occupancy of Lot 6 prior to its withdrawal in 1958 is without merit because an applicant cannot create an issue of fact simply by contradicting his own previous statements. (Answer at 14-15, citing Silas v. Babbitt, 96 F.3d 355, 358 (9th Cir. 1996)).

In his Reply, Appellant argues that BIA's failure to advise him that a Native Allotment Applicant has a preference for withdrawn land if the Native's use and occupancy began before the withdrawal, coupled with BIA's inaccurate advice that should PLO 1756 be revoked, he would get Lot 6, led Appellant to amend his legal description excluding the land described in PLO 1756, and that this constituted a waiver of his rights which was "neither knowing nor intelligent." (Reply at 6.)

Appellant's principal contention on appeal is that reinstatement of his application and an opportunity for a hearing are mandated by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), because he claims that he commenced use and occupancy of the land in 1941 rather than 1961, and this raises an

issue of fact. He argues that the doctrine of administrative finality is not applicable because he has been denied due process. Carlson also contends that section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1994), compels reinstatement of applications pending on December 18, 1971, which would have been the case with respect to the 6.5 acres but for the denial of due process.

[1] BLM contends that the proper approach for the Board is to determine whether the original rejection of Appellant's application was based on a question of law or a question of fact. It argues, citing Heirs of George Brown, 143 IBLA 221 (1998), and Administrative Judge Burski's concurrence in William Demoski, 143 IBLA 90, 95 (1998), that if the rejection was as a matter of law, the doctrine of administrative finality applies with the understanding that it will not be a bar to reinstatement if its use would result in manifest injustice or where other compelling legal or equitable considerations exist.

Examining BLM's decision rejecting Appellant's original application for a Native allotment, it must be concluded that the application was rejected as a matter of law. Regulations in effect at the time the original application was filed in 1964 provided:

Applications for allotment must be filed, in triplicate on a form approved by the Director, properly and completely executed, in the land office which has jurisdiction over the lands. The application must be signed by the applicant but if he is unable to write his name, his mark or thumb print must be impressed on the application and witnessed by two persons.

43 C.F.R. § 2212.9-1(a) (1964). The application filed in 1964 was not "signed by the applicant." Thus, it failed on its face to meet the regulatory requirements for a valid application. As the court stated in Silas v. Babbitt, supra at 358:

Requiring an oral hearing in those cases where the face of the application shows that the applicant is not qualified would place an undue burden on the government's resources. \* \* \* The Constitution requires due process of law; it does not require an endless number of opportunities for one to assert his rights.

As Judge Burski explained in his concurring opinion in Demoski, 143 IBLA at 116, while the Board has applied administrative finality concepts in the allotment reinstatement context in certain cases, in others we have asserted that these considerations have no applicability in this field. Clearly, the better approach is to acknowledge the applicability of the doctrine of administrative finality to the reinstatement of allotment applications and to apply it in appropriate circumstances. Under that doctrine, when a Native allotment application has been rejected as a matter of law, and, as in this case, the applicant has not appealed that determination, a request for reinstatement of that application is properly

rejected based on the doctrine of administrative finality, unless its use would result in manifest injustice or other compelling legal or equitable considerations exist.

Appellant asserts that he has been using a road crossing Lot 6 to access his other lands. However, in its 1982 decision approving his allotment, BLM expressly referenced its 1965 rejection of Lot 6. Appellant did not appeal that decision. Appellant asserts that he attempted "at different times to have BIA help me get this land back. Nothing has ever been done." (SOR, Affidavit of Bud J. Carlson, dated June 17, 1997, at 1.) Appellant also contends that his use and occupancy of Lot 6 commenced in 1941, at a time when he was 8 years old, even though he asserted use and occupancy commencing in the 1960's when he applied for all his adjacent land. Appellant's failure to assert a claim to Lot 6 for over 15 years following the approval of his allotment application and his belated assertion of use and occupancy dating from 1941 do not create an issue of fact mandating a hearing.

In this case, Carlson also contends that ANILCA requires reinstatement of his original 1964 application. However, the only allotment application that could fall within the ambit of the ANCSA savings provision by being pending before the Department on December 18, 1971, was his amended 1968 application seeking lands other than the land in question here. Accepting each and every statement in that application as true and accurate, his application for the adjacent lands filed in 1968 did not aver use and occupancy that would have been qualifying as to the 6.5 acres.

Appellant has failed to demonstrate that denial of his request for reinstatement would result in manifest injustice. In addition, there are no compelling legal or equitable reasons for reinstating the application rejected in 1965.

In the course of our review we have also considered the other arguments advanced by Appellant. We do not deem a lengthy discussion of our reasons for rejecting those arguments necessary or beneficial.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

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James P. Terry  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge